82-1549

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA

v.

VICTOR DOMINGO GARCIA, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether this Court lacks jurisdiction to review the decision in the instant case because the indictment in the instant case was dismissed upon the government's motion.

2. Whether the court should refuse to review the arguments raised in the government's petition for a writ of certiorari because the government failed to timely present these arguments to either the District Court or the Court of Appeals.

3. Whether the petition for writ of certiorari should be dismissed because the issue presented for review is an issue of state law.

Parties to the Proceeding

In addition to the parties shown by the caption of this case, Ruben Barrera-Saenz and Adan Montolla Mungia were appellants below and are respondents here.

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Victor Domingo Garcia, Adan Montolla Mungia and Ruben Barrera-Saenz, through the undersigned counsel, move for the dismissal of the Solicitor General's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A in government's brief, 1a-17a) is reported at 676 F.2d 1086. The ruling of the district court denying respondents' motion to suppress evidence (App. D, in government's brief) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 28, 1982. A petition for rehearing was denied on December 20, 1982. Upon the government's motion, the

indictment was dismissed on January 12, 1983. On February 9, 1983, Justice Rehnquist extended the time to file a petition for a writ of certiorari to and including March 20, 1983. As set out more fully at pages 13-17 *infra*, respondents submit that dismissal of the indictment effectively extinguished a live case and controversy and this Court, therefore, lacks the power to review the decision in this case. In addition, this Court lacks jurisdiction to review the decision of the Court of Appeals, because only a question of state law is involved.

Statement

Victor Domingo Garcia, Ruben Barrera-Saenz, and Adan Montolla Mungia were all arrested October 17, 1980, and charged with conspiracy to possess marijuana with the intent to distribute it in violation of 21 U.S.C. § 846 (Count I), and with possession of the 2,073 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1) (Count II). Following a jury trial in the United States District Court for the Southern District of Texas respondent Mungia was convicted of possessing marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and respondents Garcia and Barrera were convicted of conspiring to commit that offense, in violation of 21 U.S.C. § 846.

Prior to their trial, respondents moved to suppress the evidence as obtained in violation of their Fourth Amendment rights since it was (1) seized without probable cause to arrest or to search the vehicle containing the marijuana and without reasonable suspicion for the stop, and (2) the arrests were illegal because the arresting officer, a Texas state deputy game warden, had no authority to arrest them. The following testimony was adduced at a pretrial hearing on the suppression motion.

Deputy Game Warden Christopher Huff—the sole government witness to testify about the circumstances

which led to the arrest of respondents—stated that on October 17, 1980, he and Deputy Game Warden Hilario Saenz, were perched upon a hill on the Rosa Ranch some 12.8 miles north of Rio Grande City, Texas, and 100 yards off Highway 3167 (61, 63, 67, 110, 144).[1] Huff was looking for poaching and rustling activities (62, 110). Though he thought himself to be a peace officer, he understood his job to be concerned exclusively with gaming violations (62, 177). He had no idea whether he possessed general law enforcement authority (127).

A short time after the pair had nested on the knoll, one vehicle, wholly unidentifiable in the darkness except for its noisy muffler (111), approached them coming north on 3167. Three hundred yards from the lookout hill, however, the vehicle turned around and headed back south (62, 111). Though it may or may not have had its lights on at all times (111, 402), it was not followed.

At approximately 10:15 p.m., the deputy game warden heard a "loud noise" which prompted Huff to scan the area with a pair of binoculars (62, 63). According to his testimony at the suppression hearing, Huff then saw an eighteen wheel diesel semi-truck with a tank trailer some 300 yards away being driven without lights on a ranch road within the Rosa property (63, 65, 68).[2] At trial,

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[1] Numbers in parentheses refer to the original Record on Appeal which consists of the transcript of proceedings (Vols. II—VIII, pp. 1-1403), and all original papers filed (Vol. I, pp. 1404-1610). Where reference is made to matters which are also containd in the Record Excerpts, prepared by defendants pursuant to Local Rule 13.1, a cite to "RE" is also made.

[2] Some mention has been made of Huff's assertions that the Rosa Ranch was neither a dairy farm nor an oilfield (136-137, 153-154). On cross-examination, however and with the aid of a map, he admitted that areas west, east and south all contained oilfields (155-156), upon which the presence of a tank truck would raise nary an eyebrow. Indeed, it was revealed during the trial that the Rosa Ranch itself had at least one oil storage tank (376).

however, Huff corrected this testimony, stating that the moving object was 1,000 yards away (302 and *see* 533) and, in light of the geography of the area, i.e., the brush, he could not have seen the moving vehicle or, its lights.[3] Eventually, the truck intersected Highway 3167, and at that point its lights were on (63, 65, 68, 307, 498).

The vehicle was being driven in a wholly lawful manner, including its possible lack of illumination while on a private road (117, 118). Nor was there any suspicion that the vehicle was involved in a violation of the gaming laws.

Huff assumed, however, that the vehicle was either (a) stolen; or (b) being used to haul marijuana; or (c) being used for cattle rustling (72, 128, 146). These assumptions were premised upon the following: (a) the lack of headlights; (b) Huff's knowledge that there had been stolen vehicles in the area;[4] and (c) Huff's knowledge that large trucks had been used to haul marijuana (72, 105). Huff's knowledge with respect to stolen vehicles was over three months old. While working with Sheriff's Officers from Hidalgo County he "learned" of a stolen grain hauler. This vehicle, however, was not even the subject of a BOLO ("be on the lookout") (121-122). The information about the use of large trucks to haul marijuana consisted of what might have been a casual conversation between Huff and one Bill Matthews, a Customs Patrol Officer (106, 142).

Based upon the aforementioned suspicions the deputy game wardens took off in pursuit of the vehicle to stop it and search it (507-508). At a point approximately one-

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[3] The likely inability of a similarly situated viewer to see the lights of a vehicle traveling on that road was confirmed by Larry Gene Medina, a land surveyor, who performed tests in the area on behalf of the defendants (861).

[4] The "area" was not defined, but Huff appeared to be responsible for the entire Rio Grande "area" (59).

half mile from the point at which the truck turned on to the public highway, Huff and Saenz did stop the vehicle (73). Deputy Warden Huff, armed with a Magnum .357 (119-120), and Deputy Warden Saenz, possibly armed with a shotgun (120), approached the vehicle, with Huff walking towards the driver's side and Saenz covering the passenger side (73, 75).

Defendant Adan Montolla Mungia (hereinafter "Mr. Mungia") the driver, emerged from the vehicle (75, 76), was confronted by Huff, and produced a seemingly valid[5] State of Texas commercial operator's license upon request (76, 118). Huff asked the driver what he was doing (77), and Mr. Mungia responded (a) that he had come from a ranch further south, (b) that he was supposed to pick up a load from the Las Escobar Ranch,[6] but (c) that he was having difficulty locating the property, and (d) was considering returning home to Robstown (77, 154). Questioned further about his employer, he stated only (3) that he worked for "a gringo" (78, 154).

Though Mr. Mungia was not informed he was under arrest at this point, Huff testified that he would have prohibited Mr. Mungia from leaving (119), and that the only reason he requested the license was to learn the driver's identity in the event he did flee (119).

Finding Mr. Mungia to be "acting nervous," Huff "advised him [he] was going to search his vehicle" (78, 124, 154). To do so, he hoisted himself or jumped seven feet to the first rung of the tank truck's ladder and climbed the ladder to the top of the vehicle where the entry hatch was located (79, 130-131), whereupon he inspected the exterior

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[5] Huff testified that he never checked the validity of the license (118), nor did he even compare the photograph with the producer (118). He did note, however, that there was nothing suspicious about the license (118).

[6] The Las Escobar ranch was in fact only 18 miles away and could be reached by driving along Highway 3167 (115, 507).

and noted what he considered to be "marijuana residue" (79, 131).[7] He unscrewed the wheel which bolts the hatchway and, upon opening the hatch, first smelled what he identified as marijuana (79, 131). Using a flashlight and peering into the tank, he discovered sacks, later identified as marijuana-filled (79, 131).

Mr. Mungia was thereafter handcuffed (80), though still not read his rights (82), and placed in the game wardens' vehicle. Saenz remained with the truck (81), presumably still with his shotgun, and Huff and Mr. Mungia returned to the intersection of Highway 3167 and the ranch road (81).

Concealing his car at a point where he could still retain a view of any vehicle traveling on the same ranch road upon which Mr. Mungia's vehicle had allegedly traveled (81), Huff spotted a 1976 Chevrolet pickup truck emerging from the road, supposedly without lights (87). (Hereinafter, the "beige pickup.")

Huff stopped this vehicle and ordered its three occupants—Angel Garza Soliz, Victor Domingo Garcia, and Ruben Barrera Sanez[8]—to "step out" (89).[9] They were

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[7] That view could not have been had from the ground (132, 375).

[8] Mr. Garcia is a prominent rancher in Starr County. At trial, he and Mr. Barrera, his friend and occasional employee, said that they had spent the afternoon and part of the evening attending to chores on Garcia's land (1012-1025). Garcia was driving Barrera to a hospital where Barrera's daughter was recovering from surgery when a tire on his vehicle—the white pickup mentioned at page 7, *infra*—was punctured (1025). There was no spare tire, and consequently Garcia and Barrera got out and started walking. Near a trailer bordering property owned by one Bermudez, the men saw the headlights of the beige pickup (1026). They stopped the pickup and the driver agreed to give them a ride (211, 1027-1028).

[9] Though Huff testified that he did not draw his gun, both Garcia (1035) and Barrera (1217) testified that he did.

not sweaty nor did they smell of marijuana, but they were placed under arrest nonetheless (340).

Garcia and Barrera thought that they were going to be shot. Mr. Garcia, who knew Huff from the area, told him "we are not going to hurt you" (92, 97, 1029, 1036). Ignoring Mr. Garcia's plea for both an explanation of what was going on (1041), and an opportunity to translate Huff's commands into Spanish for the benefit of Mr. Barrera (1033), the three were frisked, their wallets removed (1035); and an ammunition clip for a .45 handgun was found in Mr. Garcia's back pocket (90).[10] When asked whether there were any weapons around, Mr. Garcia informed Huff that his pistol was "in front" of the vehicle (90) and a Colt .45 was thereafter retrieved by Huff (96).[11]

Huff then called for assistance from the Starr County (Texas) Sheriff's Department (97). Within 15 minutes aid had arrived (98), and Huff was free to search the property for Mr. Garza (99), who had absconded into the brush while Huff was occupied with radioing for assistance (97-98).

Heading southwest and following tracks in the dirt road (247), he and Starr County Deputy Sheriff Reynaldo Saenz unlocked an iron gate (99, 602-3, 606), the key for which Huff possessed and was a common one in the area used by many ranchers (888, 896). There they came upon the vehicle which Messrs. Garcia and Barrera had just left (100, 250).[12] Though the cab was locked (257), the

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[10] In addition, a small quantity of marijuana in a plastic bag was found in Mr. Garza's boot (94).

[11] Mr. Garcia testified that he never partrolled his lands without a weapon, for there had been "trouble" recently (1020, 1040, 1079). Though he normally relied upon a rifle which he kept in his pickup truck (1041), since his wife had the vehicle that day, he resorted to another weapon (1041).

[12] See footnote 8 at page 6, *supra*.

two officers examined it and the bed with a flashlight (256, 587, 593, 598, 614). Neither saw any marijuana in the bed of the truck (256), though Huff claimed he saw "marijuana residue" (crushed leaves and seeds) in the area "around" the vehicle (101, 256).

The two returned to the rendezvous scene, that is, the point where the beige pickup had been stopped, by which time several Customs Patrol Officers (CPO's) had arrived (274). Forgetting about the escaped prisoner (625), three CPO's then accompanied Huff (625) and Deputy Warden Saenz, who had then returned (274, 465-6) to re-examine the white truck.

Though CPO Ochoa claimed to have seen "marijuana residue" on the rim of one tire and an outer bumper[13] (628), she neither pointed it out to anyone (636), nor preserved any of it (635). In addition, perhaps overcome with excitement at her first marijuana seizure (640), she trampled over the "residue" on the muddy ground and climbed into the bed of the truck for a closer search (641-642). It was not, however, until the following day, after the truck had been driven to the Customs lot in Rio Grande City (637), that another agent, also crawling about the bed, found a minute quantity of marijuana which was actually preserved as evidence (750).[14]

During this period CPO Aldrete approached Mr. Garcia, the first to entertain the latter's inquiries about his predicament (718). It was then that Garcia volunteered information about the flat tire on a white pickup truck, prior to receiving information that it had been found (718).

Thereafter, CPO Flores searched Mr. Garcia for a key to the vehicle, which he readily supplied (677). In addi-

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[13] Ms. Ochoa was unable to describe marijuana or distinguish it from Buffalo grass (640, 647), which was widely cultivated on the property (1016).

[14] Similarly, a minute quantity of marijuana was found in the beige vehicle (750).

tion, Mr. Garcia had a master key, which predictably, fit the lock to the iron gate (665, 678).

Thereafter, Flores and yet another CPO, Springer, examined the white pickup, this time including the formerly locked interior (697). This netted no more than a 2-way radio (740).[15]

At trial, no additional information linking either Mr. Garcia or Mr. Barrera to marijuana trafficking, or to Mr. Mungia, was adduced. A Mr. Raudel Garza (no relation to the accused) (1110) testified that he was a neighbor of Mr. Garza and had lent the beige pickup to him that day, at the latter's request (1106). No connection between any of the defendants and the vehicle was ever shown.

Interestingly, the government pressed the fact that the tracks of "a large vehicle" could be traced *to* the white vehicle, *around* the white vehicle and then *back* to the road (*e.g.* 252), the obvious inference being that the "larger vehicle," namely the tank-truck, had turned around in the presence of Mr. Garcia's pickup.

The inference however, was laid to rest by testimony of Basilio Cano, an independent trucker with 20 years' experience driving 18-wheel trucks, who testified that, given the conditions present on that road, namely the fence, the plowed fields, the texture of the narrow road, an 18-wheel vehicle was required to turn right and "loop" in order to turn in that corner of the pasture, irrespective of whether there was a stalled car in the road (1131, 1146).

Also important is Cirio Conrado Rosa's testimony that he owned a "low boy," or 20-wheel vehicle, which he used to transport heavy machinery (930). As recently as early October (931) the low boy had been in that very spot (931),

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[15] Unlike other cases involving the trafficking in controlled substances, the vehicles allegedly involved in this case could not communicate by radio. Neither the tank-truck nor the beige pickup had a 2-way radio (1188).

fully capable of making the tracks which the government had attributed to the marijuana-laden vehicle (933-948). Having failed to either photograph (*e.g.*, 744) or cause a cast to be made to record and compare the distinct impression that particular tires make in the dirt, none of the speculation could be confirmed.

At the conclusion of the suppression hearing the trial judge ruled that there were sufficient suspicious circumstances to justify the search and that a deputy game warden does have general law enforcement power under applicable Texas law (158, RE 15-7). The trial judge later amended these findings to include a finding that probable cause existed to search the vehicle occupied by Soliz, Garcia, and Barrera in light of (a) the discovery of marijuana in the Mungia vehicle, and (b) its failure to have headlights on (167, RE 20). Another ruling was made after the government, contrary to a prior understanding, sought to introduce evidence about marijuana residue on a tire and bumper of the white pickup truck (410-420). The trial judge denied suppression finding that, in light of its prior ruling, there was probable cause to search and the discovery and search of this vehicle was proper (453, 457, RE 22, 25).

The Court of Appeals for the Fifth Circuit reversed the District Court, holding that the marijuana should be suppressed. Because state officers arrested respondents, the Court used Texas law to determine the legality of their arrests. The Court concluded that, under the applicable Texas statutes

> Game wardens have the powers, privileges, and immunities of peace officers while on state parks . . . Outside of parks, however . . . game wardens may arrest with or without a warrant only in connection with violations of the gaming laws. 676 F.2d at 1091.

Because the arrests were not premised upon a suspected violation of Texas game laws, and did not occur on a Texas

state park, the Court held that they were unlawful, and the evidentiary fruits of these arrests should not have been introduced at respondents' trial.[16] The court also rejected the argument that because Deputy Game Warden Huff believed that he was a peace officer the evidentiary fruits of respondents' arrests were admissible under the "good faith" exception recognized in *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981). After noting again that Texas law controlled the legality of respondents' arrests, the Court observed that under Texas law, an arresting officer's good faith does not suffice to purge an unlawful arrest of its illegality as far as the exclusion of evidence is concerned, and that it was not the Fifth Circuit's role to engraft a good faith exception onto Texas jurisprudence.

On July 9, 1982, counsel for respondents was served with a Petition for Rehearing. The government argued that rehearing was warranted on the grounds that (a) a three judge panel of the Texas Court of Criminal Appeals had recently held in *State* v. *Christopher*, 639 S.W.2d 932 (Tex. Crim. App. 1982), that a game warden has general authority to arrest, and (b) because the Fifth Circuit should have used federal rather than state law to determine the legality of respondents' arrests. Respondents moved for, and were granted, permission to file an answer

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[16] In its petition for certiorari the government suggests that Huff could have made a lawful citizen's arrest under Article 14.01(a) of the Texas Criminal Procedure Code. The Fifth Circuit rejected that argument:

> The government has not argued that the detention and arrest of appellants can be justified as a citizen's arrest under article 14.01. Indeed, no such argument can be made, since it is not contended that driving without lights on a private road is even illegal, much less a felony or an offense against the peace. Whatever suspicions of criminal activity may have been harbored by Huff, he did not testify that a felony was actually committed by any of the appellants in his presence or within his view. 676 F.2d at 1093, n. 22.

to the Petition for Rehearing. Respondents requested the Court to postpone reconsideration of its decision pending a decision by the Texas Criminal Court of Appeals on Christopher's petition for a rehearing *en banc*. Respondents also argued that the government's second claim—i.e., that state rather than federal law should have been used to determine the legality of respondents arrests—could not be raised on a Petition for Rehearing because the government could have raised that argument in either the District Court or in its brief for the Fifth Circuit, but had failed to do so.

On October 20, 1982, the Texas Criminal Court of Appeals sitting *en banc* rendered a decision on Christopher's petition for rehearing. The Court upheld the legality of Christopher's arrest by a game warden for a traffic infraction noting that Article 6701(d) Sec. 153, V.A.C.S. expressly provided any peace officer, including game wardens, with authority to arrest for traffic violations. The Court, however, explicitly rejected the argument Art. 14.03 of the Code of Criminal Procedure provided game wardens with general arrest powers:

> We do not agree with the panel opinion that Art. 14.01(b), *supra*, creates a *general* power for any peace officer to arrest without a warrant under the stated conditions. That article is part of Chapter 14, which delineates the circumstances under which no warrant is required for an arrest. It does not purport to delineate who is a peace officer . . . To hold that Art. 14.01(b) authorizes any peace officer to arrest for any offense would effectively render meaningless all specific grants of authority, such as the Parks and Wildlife provisions quoted above . . . It would also give deputy constables and municipal park patrolmen (Art. 2.12(a) and (13), *supra*), state-wide jurisdiction. We do not believe the legislature intended such a result. 639 S.W.2d at 937.

Citing the above language as evidence that the Texas Criminal Court had effiectively disposed of the only viable ground for rehearing in the instant case, the respondents moved for dismissal of the Petition for Rehearing in the instant case. On December 20, 1982, the Fifth Circuit denied the government's Petition for Rehearing citing the *en banc* decision in *Christopher*. On January 11, 1983, the government moved for dismisal of the indictment. By an order dated January 12, 1983 the indictment was dismissed on grounds of the Fifth Circuit decision.

On February 9, 1983, nearly a month after the dismissal of the indictment, Justice Rehnquist extended the government's time to file a Petition for a Writ of Certiorari.

Subsequently, the government filed a petition seeking certiorari on the grounds that (a) the Court of Appeals extended the reach of the Fourth Amendment exclusionary rule beyond its extended scope; (b) that the Court erroneously declined to apply its own good faith exception to the exclusionary rule in this case; and (c) that the Court erred in looking to state evidentiary rules to determine the applicability of the exclusionary rule.

Reasons for Dismissing the Petition

Respondents urge this Court to dismiss the petition because (a) there is no live case or controversy to be reviewed; (b) the government waived the arguments presented in the petition for a writ of certiorari by failing to present them to the lower courts; and (c) the Fifth Circuit's decision is premised upon state law and hence is not a proper subject for review by this Court.

A. There Is No Longer a Live Case or Controversy Warranting Review

The dismissal, on the government's motion, of the indictment in the instant case, deprives this Court of juris-

diction to entertain the government's petition for a writ of certiorari.

This Court is not empowered to decide moot questions or abstract propositions. This Court's "impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy'" *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) and authorities cited therein.

The dismissal of the indictment in this case effectively extinguishes any case or controversy. Because the indictment has been dismissed, it is not possible to reinstate respondents' conviction or remand for further proceedings.

The suggestion incorporated by the government's reference to its supplemental brief in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed March 15, 1983)—i.e., that respondents' convictions could be reinstated notwithstanding the dismissal of the indictment—is wholly untenable. Indeed, it ignores the fact that a valid indictment is a jurisdictional prerequisite for a judgment of conviction. *Arrington* v. *United States*, 350 F.Supp. 710 (E.D. Pa.), aff'd 475 F.2d 1394 (3rd Cir. 1973); *United States* v. *Clark*, 412 F.2d 885 (9th Cir. 1969).

Equally untenable is the government's attempt to bring this case within the rule that obedience to mandate of a lower court does not moot a case. The mandate of the Fifth Circuit did not direct the government to dismiss the indictment. Indeed, the government itself moved for the dismissal of the indictment.

Inasmuch as there is no longer a case or controversy, the petition should be dismissed.

B. Claims Not Presented Below May Not Be Reviewed by This Court

None of the arguments raised in the government's petition for a writ of certiorari were raised in the District Court. Nor did the government raise any of these arguments in the Fifth Circuit until after that Court had held that respondents' arrests were illegal under Texas law. At that point, the government, in its petition for a rehearing, protested that federal rather than state law should have been used to determine the validity of respondents' arrests.

It is the practice of this Court to decline to review matters not presented below. *F.T.C.* v. *Travelers Health Ass'n,* 362 U.S. 293, 298, n. 14 (1960); *Ullman* v. *United States,* 350 U.S. 422, 440, n. 15 (1956); *Marconi Wireless Telegraph Co.* v. *Simon,* 246 U.S. 46 (1918). Since none of the claims now advanced in the government's petition were timely presented to either the District Court or the Court of Appeals, they are not reviewable by this Court.

C. The Instant Case Presents an Issue of State Law Which Is Not Reviewable by This Court

Notwithstanding the government's claims to the contrary, the decision in this case is not a new extension of Fourth Amendment law. The Fifth Circuit simply followed long established precedent—precedent which the government decided to question only after its interpretation of Texas law was rejected—and looked to Texas law to determine the legality of arrests made by Texas game wardens.

Nor does the result in the instant case create a danger that the outcome of federal criminal prosecutions in different states will vary widely because of the idiosyncrasies of state law. The rule promulgated in *United States* v. *DiRe,* 332 U.S. 581 (1948), does not appear to have hindered the administration of justice in the federal system

and there is no reason to believe that this state of affairs will change.

Furthermore, a finding that game wardens do not under state law have general arrest powers is hardly likely to have much consequence for law enforcement. It is a fairly safe assumption that states will rely on officers other than fish and game wardens for the enforcement of criminal laws and that these other officers possess general arrest powers. Thus, a finding that game wardens in Texas or any other state do not have general arrest powers does not seem likely to result in many instances where criminals will go free as a result of an unlawful arrest.

Indeed the government has not shown any justification for this Court to abandon years of precedent and to burden itself with the task of creating a federal law of arrest.

While the federal government's interest in the activities of fish and game wardens in a particular state is minimal, states obviously have a substantial interest in defining the scope of a game warden's authority to make an arrest, and in deterring the unauthorized activity through the application of the exclusionary rule. Texas has obviously chosen not to carve out a good faith exception to its exclusionary rule. Proper deference to Texas's legitimate interest in discouraging illegal action on the part of game wardens even if such action is done in good faith, mandates that federal courts suppress the fruits of unauthorized arrests made by Texas game wardens.

In short, the decision of the instant case is not a novel extension of Fourth Amendment, but simply an application of Texas law. The correctness of the Fifth Circuit's interpretation of Texas law, moreover, was confirmed by the Texas Criminal Court of Appeals sitting *en banc*. Since there is no federal question involved here this Court lacks jurisdiction to review the case. *Cramp* v. *Board of Public Instruction of Orange County, Fla.*, 318 U.S. 278 (1961); *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965).

CONCLUSION

For the above-stated reasons this Court should dismiss the petition for writ of certiorari.

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